

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT J DENORIS,

Plaintiff,

v

JO ANNE B BARNHART,
COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

No C 04-01659 VRW

ORDER

Plaintiff Robert J Denoris appeals from the decision of the Social Security Administration (SSA) denying plaintiff social security disability benefits. The court now considers cross-motions for summary judgement. Pl Mot (Doc #13); Def Mot (Doc #14). Because the court concludes that the ALJ's decision was based upon legal error, the court GRANTS plaintiff's motion and DENIES defendant's motion.

I

A

Plaintiff was fifty-three years old on September 8, 2001, the date he alleges he became disabled. Administrative Record, Doc # 8 (AR) 75. Plaintiff is a high school graduate and has past relevant work experience as a lab technician and driver. AR 76. Plaintiff reports that as a lab technician he used technical skill and knowledge, lifted weights as heavy as twenty pounds occasionally and ten pounds frequently. Id. Plaintiff has not worked since September 8, 2001. AR 75.

On September 11, 2001, plaintiff underwent open heart bypass surgery and a mitral valve replacement. AR 78, 242. Since the date of his surgery, plaintiff has complained of severe depression, sleep deprivation, fatigue, shortness of breath and dizziness. AR 100. Plaintiff's medical history is primarily reported in the records of his three treating physicians: Dr Kenneth Jiang, MD, Dr Martin Bress, MD, and Dr Niel Starksen, MD. One month after surgery, Dr Steven Schwartz, plaintiff's surgeon, wrote that plaintiff's heart had a regular rate and rhythm and good valve click. AR 242. After examining plaintiff on November 30, 2001, Dr Starksen wrote that the prosthetic mitral valve was functioning normally, and that plaintiff had no further symptoms. AR 346. On August 7, 2002, Dr Starksen recorded that plaintiff's cardiac exam and stress echocardiogram were both normal, and that there was no evidence of ischemia. AR 337. Dr Starksen also noted that plaintiff was "possibly depressed." AR 339. Dr Bress, in a letter to Dr Jiang, stated that on March 26, 2003, plaintiff had completed thirty-six sessions of cardiac rehabilitation, that there

1 was no evidence of inducible myocardial ischemia and that plaintiff
2 seemed motivated to make a lifestyle readjustment and planned to
3 join a gym. AR 401.

4 Five months later, plaintiff's treating internal medicine
5 physician Dr Jiang, in a "cardiac medical source statement
6 questionnaire" dated August 12, 2003, opined that plaintiff was
7 incapable of even low stress jobs, was unable to sit or stand for
8 more than two hours, incapable of lifting more than twenty pounds,
9 and must avoid all exposure to extreme cold, heat, wetness,
10 humidity, noise, fumes, odors and hazards. He noted, moreover,
11 that plaintiff was not a malingerer. AR 495-98.

12 Plaintiff testified that he saw a psychologist for his
13 depression "for a little while." AR 39. Treating psychologist Dr
14 Wendy Sinclair-Brown, PhD, responded to a medical records request
15 for the period during which she treated plaintiff for depression
16 with the statement that "patient has no psychological problems that
17 prevent him from participating in ADL's or the workforce." AR 369.
18 She provided no other records. Id.

19 The record also contains reports from consulting
20 examinations ordered by the SSA in connection with plaintiff's
21 claim for benefits. On November 2, 2002, psychiatrist Arthur
22 Floreza, MD, examined plaintiff and diagnosed him with a
23 "depressive disorder not otherwise specified," noting that "[h]e is
24 now currently spending a good deal of time isolating himself from
25 the public and so he would likewise have difficulty maintaining
26 regular attendance in a workplace." AR 363-67. Dr Floreza further
27 noted that plaintiff's depression was likely secondary to his
28 medical condition, and that due to "the chronicity of his medical

1 condition [h]is prognosis is quite poor and [] he will [be]
2 unlikely [to] improve within the next 12 months." AR 366. Dr
3 Floreza concluded: "[h]e would be capable of completing simple and
4 repetitive tasks if his medical condition allows * * *[and] the
5 claimant would not have difficulty with complex tasks, again,
6 medical condition permitting." AR 367. On December 19, 2002,
7 psychiatrist Donald Walk, MD, completed a "Mental Residual
8 Functional Capacity Assessment," indicating that he found plaintiff
9 to be moderately limited in the areas of "the ability to complete a
10 normal workday and workweek without interruptions from
11 psychologically based symptoms and to perform at a consistent pace
12 without an unreasonable number and length of rest periods" and "the
13 ability to interact appropriately with the general public." AR at
14 371. Dr Walk concluded that plaintiff has a "depressive feature
15 [that] may reduce public interaction/persistence: [but] he can
16 adapt to competitive employment." AR 372.

B

19 On June 24, 2002, plaintiff filed an application for
20 social security disability benefits. AR 68. In his initial
21 application, plaintiff stated that he was disabled due to his heart
22 condition; in his reconsideration disability report he stated that
23 his injury had worsened and he was suffering from severe
24 depression, fatigue, sleep deprivation, shortness of breath and
25 dizziness. AR 75, 100. Both initially and on reconsideration, the
26 SSA denied Plaintiff's request for benefits finding that plaintiff
27 was not disabled within the meaning of Title Two of the Social
28 Security Act (Act). AR 55, 60.

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3 Plaintiff filed a timely request for an administrative
4 hearing, which took place on August 28, 2003. At the hearing,
5 plaintiff testified that he was unable to work due to depression
6 and extreme fatigue resulting from his heart condition. AR at 37,
7 39. The vocational expert (VE) testified that a hypothetical
8 fifty-five-year-old individual with plaintiff's past relevant work
9 experience, level of education, and a residual functional capacity
10 (RFC) for light work would be able to work as a lab technician. AR
11 43. The VE also testified that if an individual was limited in the
12 manner described by Dr Jiang (unable to sit or stand for more than
13 four hours in a day or to be exposed to extreme environmental
14 conditions and needing to miss work more than four times a month)
15 that individual would not be able to work in any job which exists
16 in substantial numbers in the economy on a full-time basis. AR 48.

17 On October 21, 2003, the administrative law judge (ALJ)
18 denied benefits based on the evidence presented at the hearing,
19 including the testimony of plaintiff and the VE, the reports of Drs
20 Starksen, Jiang, Bress, and Schwartz and other medical records. AR
21 14-20. The ALJ's decision set forth the five-step sequential
22 evaluation of disability required by 20 CFR § 404.1520, which
23 considered the following: 1) whether plaintiff was currently
24 engaged in substantial gainful activity; 2) whether plaintiff had a
25 severe impairment or combination of impairments; 3) if plaintiff
26 had a severe impairment, whether plaintiff had a condition that met
27 or equaled the conditions outlined in the Listing of Impairments,
28 20 CFR § 404, Pt 404, Subpt P, App 1; 4) if plaintiff did not have
such a condition, whether plaintiff was capable of performing his

1 past work; and 5) if not, whether plaintiff had the RFC to do other
2 available work.

3 Applying this five-step sequential evaluation to
4 plaintiff, the ALJ found that: 1) plaintiff met the Act's insured
5 status requirements through December 2006 and had not been engaged
6 in substantial gainful activity during the relevant period; 2)
7 plaintiff had a history of coronary artery disease, status post
8 mitral valve replacement and double bypass, and mild depression; 3)
9 plaintiff did not have an impairment that met or equaled any listed
10 impairment; 4) "the claimant's subjective complaints of shortness
11 of breath, frequent fatigue, reduced stamina and stress were
12 uncorroborated by objective clinical signs and findings showing the
13 existence of medically determinable impairments that could
14 reasonably cause the degree of incapacity alleged"; 5) the
15 conclusions of the functional assessment form submitted by Dr Jiang
16 were not supported by the clinical signs and findings and were
17 contrary to the doctor's progress notes - "[f]or example, Dr Jiang
18 provided no explanation why an individual who was ready to join a
19 gym in March 2002 was incapable of more than very restricted
20 activities in August 2002"; 6) plaintiff retained the RFC for an
21 essentially full range of light work; 7) plaintiff's past relevant
22 work as a lab technician was skilled light work and his past
23 relevant work as a truck/van driver was medium semi-skilled work;
24 8) plaintiff retained the RFC for his previous employment as a lab
25 technician and also had the capacity to perform other jobs that
26 exist in significant numbers in the national economy; 9) the
27 claimant had not been under a disability as defined by the Act at
28 any time through the date of the decision. AR 16, 19.

The ALJ also reasoned that the fact that plaintiff had undergone surgery and was taking medication "does not render him disabled," and commented that "given the nature of the surgery his functional nature may have improved." AR 17. Further, the ALJ found that plaintiff's depressive disorder was not severe, reasoning that "[t]he claimant's minimal treatment does not support the presence of a severe mental impairment." Id. The ALJ concluded that plaintiff was not disabled because he was capable of performing his former light work as a lab technician, or, alternatively, was able to perform other jobs per the VE's testimony. Id.

Plaintiff appealed the ALJ's decision to the SSA's Appeals Council, which denied review. On April 28, 2004, plaintiff timely filed the instant action for judicial review of the ALJ's decision.

II

The court's jurisdiction is limited to reviewing the administrative record to determine whether the ALJ's decision is supported by substantial evidence and whether the SSA complied with the requirements of the Constitution, the Act and its administrative regulations in reaching the decision reviewed. 42 USC § 405(g). A district court may overturn a decision to deny benefits only if the decision is not supported by substantial evidence or if the decision is based on legal error. See Andrews v Shalala, 53 F3d 1035, 1039 (9th Cir 1995); Magallanes v Bowen, 881 F2d 747, 750 (9th Cir 1989). "Substantial evidence" is defined as "more than a mere scintilla but less than a preponderance; it is

1 such relevant evidence as a reasonable mind might accept as
2 adequate to support a conclusion." Andrews, 53 F3d at 1039.

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4 III

5 A

6 The Act provides that certain individuals who are "under
7 a disability" shall receive disability benefits. 42 USC §
8 423(a)(1)(D). Disability is the "inability to engage in any
9 substantial gainful activity by reason of any medically
10 determinable physical or mental impairment which can be expected to
11 result in death or which has lasted or can be expected to last for
12 a continuous period of not less than 12 months." 42 USC §
13 423(d)(1)(A). An individual will be found disabled if his
14 impairments are such "that he is not only unable to do his previous
15 work but cannot, considering his age, education, and work
16 experience engage in any other kind of substantial gainful work
17 which exists in the national economy * * *." 42 USC §
18 423(d)(2)(A).

19 To evaluate a claim of disability based on mental
20 impairment, the ALJ is required to employ a "special technique" at
21 the administrative hearing level to assist in 1) identifying the
22 need for additional evidence, 2) considering and evaluating the
23 functional consequences of the mental disorder on the claimant's
24 ability to work and 3) organizing and presenting the facts. See 20
25 CFR § 404.1520a(b). The regulation provides:

26 (b)(1) Under the special technique, we must
27 first evaluate your pertinent symptoms, signs, and
28 laboratory findings to determine whether you have a
medically determinable mental impairment(s). [] If we
determine that you have a medically determinable mental

1 impairment(s), we must specify the symptoms, signs, and
 2 laboratory findings that substantiate the presence of
 3 the impairment(s) and document our findings in
 4 accordance with paragraph (e) of this section. * * *

5 (c)(1) * * * We will consider all relevant
 6 and available clinical signs and laboratory findings,
 7 the effects of your symptoms, and how your functioning
 8 may be affected by factors including, but not limited
 9 to, chronic mental disorders, structured settings,
 10 medication, and other treatment. * * * (3) We have
 11 identified four broad functional areas in which we
 12 will rate the degree of your functional limitation:
 13 Activities of daily living; social functioning;
 14 concentration, persistence, or pace; and episodes of
 15 decompensation. [] (4) When we rate the degree of
 16 limitation in the first of three functional areas []
 17 we will use the following five-point scale: None,
 18 mild, moderate, marked, and extreme. When we rate the
 19 degree of limitation in the fourth functional area
 20 (episodes of decompensation) we will use the following
 21 four-point scale: None, one or two, three, four or
 22 more. The last point on each scale represents a
 23 degree of limitation that is incompatible with the
 24 ability to do any gainful activity.

25 (d) * * * After we rate the degree of
 26 functional limitation resulting from your
 27 impairment(s), we will determine the severity of your
 28 mental impairment(s). * * *

(e) *Documenting application of the*
technique. * * * At the administrative law judge
 hearing and Appeals Council levels[], we will document
application of the technique in the decision. * * *

(2) At the administrative law judge hearing and
 Appeals Council levels, the written decision issued by
 the administrative law judge or Appeals Council must
 incorporate the pertinent findings and conclusions
 based on the technique. The decision must show the
 significant history, including examination and
 laboratory findings, and the functional limitations
 that were considered in reaching a conclusion about
 the severity of the mental impairment(s). The
decision must include a specific finding as to the
degree of limitation in each of the functional areas
 described in paragraph (c) of this section.

20 CFR § 404.1520a (emphasis added).

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B

Plaintiff makes two major contentions in support of his motion. First, he contends that the ALJ erred by applying the wrong legal standard when determining whether plaintiff has a mental impairment; specifically, plaintiff argues that the ALJ did not follow § 1520a's requirement that she enumerate her findings as to the degree of limitation in each of the four functional areas. Pl Mot (Doc #13 at 4-5). Second, plaintiff contends that the ALJ further erred by failing to incorporate all of plaintiff's alleged impairments into the questions the ALJ posed to the VE. Id. The court agrees with these contentions and finds on that basis that remand to the agency is warranted.

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Here, the ALJ did not, at any point in her decision, "include a specific finding as to the degree of limitation in each of the four functional areas," nor did the ALJ "incorporate pertinent findings and conclusions" regarding plaintiff's alleged mental impairment as required by § 1520a. Failure to do so requires this court to remand if the plaintiff has a "colorable claim of mental impairment." See Gutierrez v Apfel, 199 F3d 1048, 1051 (9th Cir 2000). Gutierrez construed an earlier version of § 1520a which required the ALJ to complete a Psychiatric Review Technique Form (PRTF). An amended section 404.1520a became effective on September 20, 2000, and was therefore applicable to the ALJ's decision in this matter. 65 Fed Reg 507746-01. Prior to its amendment, the regulation merely required the ALJ to complete a PRTF in order to comply with the statute. Gutierrez, 199 F3d at 1049-1050. The new

1 regulation abolished the use of the PRTF in favor of requiring the
2 ALJ to set forth detailed findings and conclusions into his or her
3 decision. See 20 CFR § 404.1520a(e)(2), quoted in part III A above.

4 A plaintiff's claim of mental impairment is "colorable" if
5 it is one which is not "wholly insubstantial, immaterial, or
6 frivolous." McBride Cotton & Cattle Corp v Veneman, 290 F3d 973,
7 981 (9th Cir 2002) (quoting Cassim v Bowen, 824 F2d 791, 795 (9th
8 Cir 1987)). Dr Floreza, a consulting physician, concluded that
9 plaintiff had a depressive disorder; Dr Starksen, one of plaintiff's
10 treating physicians, noted that plaintiff might suffer from
11 depression; and Dr Jiang, another treating physician, concluded that
12 plaintiff's physical symptoms and limitations caused depression. AR
13 at 339, 396, 495. This evidence gives rise to a colorable claim of
14 mental impairment. Accordingly, the ALJ was required to follow the
15 procedures set forth in § 1520a.

16 The ALJ's noncompliance with § 1520a was not harmless
17 because it resulted in her failure adequately to consider
18 plaintiff's alleged mental impairment as a possible basis for his
19 claim of disability. Specifically, the ALJ did not consider
20 whether, based on plaintiff's degree of limitation in each of the
21 four functional areas, plaintiff's mental impairment was severe at
22 step two, met or equaled a listed impairment at step three, impacted
23 his RFC at step four, or should have been included in her
24 hypothetical questions to the VE at step five. See 20 CFR §
25 404.1520.

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The ALJ's failure to apply the special technique for mental impairments at 20 CFR § 404.1520a makes it impossible for the court to determine whether substantial evidence supported plaintiff's alleged mental impairment and whether the ALJ thus erred in failing to include this alleged impairment in the hypothetical questions posed to the VE. "An ALJ must propound a hypothetical to a VE that is based on medical assumptions supported by substantial evidence in the record that reflects all the claimant's limitations." Osenbrock v Apfel, 240 F3d 1157, 1165 (9th Cir 2001)(citing Roberts v Shalala, 66 F3d 179, 184 (9th Cir 1985)).

On remand, the ALJ must evaluate plaintiff's mental impairment using the procedure set out at § 1520a and must then repeat the remaining steps of the sequential evaluation in light of the properly-conducted mental impairment evaluation. If the ALJ determines that under the § 1520a analysis there is substantial evidence of a mental impairment the ALJ must propound hypothetical questions to the VE that reflect this limitation. If the evidence in the record is insufficient to determine the extent of plaintiff's mental impairment under § 1520a, a new psychiatric evaluation may be required. See 20 CFR §§ 404.1519(a)(b)(4), 416.919a(b)(4); see also Smolen v Charter, 80 F3d 1273, 1288 (9th Cir 1996) (holding that "[i]n Social Security cases, the ALJ has a special duty to fully and fairly develop the record and to assure that the claimant's interests are considered").

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IV

For the reasons stated herein, this matter is remanded to the SSA for re-evaluation of the evidence consistent with this order. The clerk shall enter judgment in accordance with this order and close the file and terminate all pending motions.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge